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No. 06-127

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IN THE

Supreme Court of the United States

FREEEATS.COM, INC.,

Petitioner,

v.

NORTH DAKOTA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

REPLY BRIEF OF PETITIONER

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The Supreme Court of North Dakota misinterpreted the saving clause of the Telephone Consumer Protection Act ("TCPA") as giving the States authority to regulate prerecorded interstate political polling calls. Its decision conflicts with multiple decisions of this Court and ignores the text, legislative history, and structure of the TCPA. The issue presented is of great significance, not only for its chilling effect on core political speech protected by the First Amendment, but also for its effects in other areas in which the States have adopted laws that are inconsistent with the rule implementing the TCPA adopted by the Federal Communications Commission ("FCC"). The Court should grant review to resolve this important and recurring question.

I. This Case Presents A Question Of Great Importance For Protection Of Political Speech.

1. Resolution of the issue presented by the North Dakota statute has vital significance for the protection of political speech, which is entitled to the highest degree of protection under the First Amendment. The question of the proper interpretation of the TCPA saving clause also has major consequences for many other cases in which various States have adopted laws that differ significantly from the FCC rule implementing the TCPA.

As each successive election cycle shows, prerecorded political calls have become an important tool of political advocacy. The Supreme Court of North Dakota has erroneously decided that a State law may overcome a rule adopted by the FCC which determined that prerecorded, interstate political calls should not be prohibited. This case presents a straightforward vehicle for resolution of this important issue, before that decision has further adverse effects on political pollsters, political candidates, and voters.

2. In adopting Section 227(b)(2)(B)(i) of the TCPA and directing the FCC to conduct a rulemaking to consider

the proper balancing of the First Amendment and privacy interests involved in non-commercial calls, Congress recognized the importance of the free speech considerations involved in this case. As *amici* The Center for Competitive Politics *et al.* demonstrate (Brief at 6-9), the political communications at issue in this case are at the core of the First Amendment. North Dakota's statutory ban on prerecorded interstate political calls has chilled the ability of political pollsters and candidates to communicate effectively with the residents of that State. It thereby deprives the residents of that State from access to an important source of information to help them exercise their right to vote.

The importance of review of this issue at this time is underlined by recent developments. As noted in the Petition, other States have adopted and are enforcing similar prohibitions on prerecorded, interstate political calls. (Pet. at 24 & n.8). On August 22, 2006, the Attorney General of Indiana sent a letter to the chairmen of the State's Democratic and Republican parties warning them against making automated political phone calls to Indiana voters during the upcoming election campaigns. This year alone, Indiana reportedly has fined six companies, all from out of state, for initiating prerecorded calls. The Chairman of the Indiana Democratic Party has stated that his office had planned to make prerecorded political polling calls beginning in October, but was reviewing the situation in light of the Attorney General's contact.[1] This development demonstrates that State prohibition of prerecorded political calls is a broader problem, not limited to North Dakota, and is currently having chilling effects on the speech of political pollsters, candidates, and voters.

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[1] *Indianapolis Star, "Political Parties Warned about Illegal Calls,"* Aug. 29, 2006, available at www.indystar.com/apps/pbcs.dll/article?AID=20060829/NEWS02/608290470 (visited Sept. 6, 2006). The State law involved is Indiana Code § 24-5-14-5.

3. The problems presented by the North Dakota Supreme Court's interpretation of the TCPA saving clause are not limited to political calls. Many States have enacted limits on interstate telemarketing calls that are more restrictive than those adopted by the FCC in its TCPA implementing rule. (Pet. at 24-26). The Supreme Court of Utah has erroneously interpreted the TCPA saving clause to sustain such a State law. *Utah Div. of Consumer Protection v. Flagship Capital*, 125 P.3d 894 (Utah 2005).

As *amicus* Chamber of Commerce of the United States of America demonstrates (Brief at 4-6), businesses that make interstate telemarketing communications are caught in the middle between the federal rules and the proliferating, inconsistent State requirements. They are faced with the costs and delays of compliance and the threat of litigation and penalties for any misunderstanding of these overlapping requirements. As a result, types of speech that Congress and the FCC found permissible are being deterred, and both free speech and economic interests are being adversely affected.

4. Respondent contends that review is premature, because the decision below does not conflict with the decision of any State court of last resort or any federal court of appeals. (Opp. at 6, 11). However, the decision below squarely conflicts with the governing federal law – the FCC rule that exempted from the TCPA prohibition prerecorded, interstate political calls. This Court has granted certiorari to review the effects of State laws on interests protected by the Commerce Clause, even when the legal dispute involved only an enactment by a single State and there was no conflict among the highest courts of the States or the federal circuits. *E.g., Hillside Dairy Inc. v. Lyons*, 539 U.S. 59 (2003) (Commerce Clause challenge to California milk pricing statute); *see also Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997) (Commerce Clause challenge to unique Maine tax

exemption statute); *Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358 (1991) (Commerce Clause challenge to the first State law to impose a value added tax on business activity).

Moreover, the question involved here has actual and immediate significance in the other States that have enacted laws that are inconsistent with the FCC's rule.

5. Respondent also asserts that the Court should decline review at this time and await the outcome of possible future litigation on the issue that might arise from a request for a declaratory ruling that Petitioner filed with the FCC. (Opp. at 19). The suggested approach is entirely speculative, and does not provide an appropriate means of resolving this important question. The hypothetical litigation may never occur. The FCC's decision whether to grant a request for a declaratory ruling is a discretionary act; Petitioner's request for a declaratory ruling has been pending for two years without action. (*See* Pet. 29 n.19). Further, Respondent has not committed to litigating the matter should the FCC rule against it. Indeed, California chose not to appeal the decision against application of its fax statute to interstate calls. *Chamber of Commerce v. Lockyer*, 2006 WL 462482 (E.D. Cal. 2006). (Opp. at 6). If other States follow the same approach, the question of the proper interpretation of the TCPA saving clause could evade review for a substantial period of time.

If review of this issue is deferred, the adverse effects of the decision below and of *Flagship Capital* will continue to spread. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). Further, nothing would be gained by delaying. The FCC's position is already known: It has exempted prerecorded, interstate political calls from the TCPA prohibition that otherwise would apply.

State laws that differ from its implementing rule are almost certainly preempted, and the case for preemption is at its strongest where, as here, the State law prohibits what the FCC rule permits. Should there be any doubt on this score, the Court might consider asking the Solicitor General to state the views of the United States.

II. The Court Below Erroneously Decided An Important Question In Conflict With Prior Decisions Of This Court.

1. Respondent contends that North Dakota Century Code § 51-28-02 is an exercise of its "traditional police powers" to protect consumer privacy and that a presumption against preemption should be applied. (Opp. at 1, 2, 9, 18). It cites no prior case holding that the States have power to regulate the initiating of interstate calls. This argument is without merit.

Since 1934, Congress has vested the FCC with the authority to regulate the initiation of interstate calls and has denied this power to the States. 47 U.S.C. §§ 152 (a)-(b). Against this background of preemption, the State has no "traditional police power" to exercise in the regulation of interstate telephone calls. *See United States v. Locke*, 529 U.S. 89, 108 (2000) Indeed, the very scope of Respondent's "traditional police power" argument demonstrates why review should be granted. The logic of its argument extends well beyond this case and would drastically recast the preemption doctrine.

2. There is no basis, either in the Communications Act or the TCPA, for Respondent's claim that the States are empowered "to exercise concurrent jurisdiction" over the initiation of interstate telephone calls. (Opp. at 10).

If there were no TCPA, the States would not have jurisdiction to prohibit interstate calls, and the North Dakota statute would be unconstitutional. The TCPA was enacted to establish federal rules for certain types of interstate calls and to set a federal minimum standard for

intrastate calls. Through the TCPA saving clause, Congress preserved the States' authority to regulate intrastate calls, provided that they complied with the minimum federal standards. It would be a major distortion of the TCPA to interpret the saving clause as a *grant of new authority* to the States to do what they previously could not and to provide concurrent jurisdiction over the initiation of *interstate* calls.

Sections 152(a) and (b) of the Communications Act establish a standing allocation of authority under which the FCC generally has authority to regulate interstate calls and the States may, with some exceptions, regulate intrastate calls. (Pet. at 13-14). In adopting the TCPA, Congress clearly understood that the States had no authority under the Communications Act to regulate interstate telemarketing calls. Section 2(7) of the TCPA, 105 Stat. 2394, specifically provides that "Federal law is needed to control residential telemarketing practices" because "telemarketers can evade their prohibitions [State laws] through interstate operations." The legislative history confirms that federal legislation was necessary because the States lacked this power.[2]

The substantive provisions of the TCPA do not provide the States with authority to regulate interstate telemarketing calls. North Dakota would find that power in the saving clause, 47 U.S.C. § 227 (e)(1). However, the Court has repeatedly admonished that it will not "'give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.'" *Geier v. American Honda Motor Co.*, 529 U.S. 861, 870 (2000), quoting *Locke*, 529 U.S. at 106. Simply put,

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[2] The Senate Report stated that prior State telemarketing laws "have had limited effect, however, because States do not have jurisdiction over interstate calls. Many States have expressed a desire for Federal legislation to regulate interstate telemarketing calls to supplement their restrictions on intrastate calls." S. Rep. No. 102-178 at 3 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970.

there was no prior State power over interstate calls to be saved.

3. Respondent asserts that through the saving clause, Congress preserved for the States the limited power to establish requirements and regulations on intrastate calls and the broader power to prohibit both intra- and inter-state calls. (Opp. at 3). This claim is groundless.

Congress may authorize the States to engage in regulatory activities that otherwise would be preempted due to a conflict with the exercise of federal power under the Commerce Clause. However, the Court has repeatedly stated that an exemption from the limitations imposed by the Commerce Clause must be unmistakably clear. *See, e.g., Hillside Dairy, Inc.* 539 U.S. at 66 (2003); *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992).

The saving clause does not satisfy this test. The text of Section 227(e)(1) does not refer to interstate telephone calls. Respondent argues that the term "interstate" should be introduced into the saving clause by inference, because Congress did utilize the word "intrastate." On its face, this argument fails to provide the kind of unambiguous showing required by *Hillside Dairy* and its predecessors to justify the conclusion that Congress intended conflicting State law to override the federal statute.[3]

4. As demonstrated in the Petition and the supporting *amicus* briefs, the language of Section 227(e)(1) is awkward and ungrammatical. No unambiguous, grammati-

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[3] The legislative history contradicts Respondent's argument. During final passage of the TCPA, Senate Committee Chairman Hollings expressly noted that "Section 227(e)(1) clarifies that the bill is not intended to preempt State authority regarding *intrastate* communications except with respect to the technical standards under section 227(d) and subject to section 227(e)(2). Pursuant to the general preemptive effect of the Communications Act of 1934, State regulation of *interstate* communications, *including interstate communications initiated for telemarketing purposes*, is preempted." 137 Cong. Rec. S18781, S18784 (daily ed. Nov. 27, 1991) (emphasis added).

cally consistent interpretation of the statutory text is possible. Under these circumstances, interpretation is properly guided by the structure and context of the overall statute. The structure of the Communications Act, as amended by the TCPA, refutes Respondent's claim that Congress intended to allow a conflicting State law to displace the FCC rule. The TCPA did not amend Section 152(a) of the Communications Act, which authorizes the FCC to regulate interstate calls. The saving clause is incorporated into Section 152(b), which does not grant the States authority over interstate calls, but rather limits the FCC's authority to regulate intrastate calls.

Respondent's argument, that it may only restrict intrastate calls but may prohibit intra- or interstate calls, fails for several reasons besides those noted above. First, there is no line of demarcation between the terms "requirements or regulations on" and "which prohibits." It is highly unlikely that Congress chose such an indeterminate basis for allocating regulatory authority between the federal government and the States. *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 812 (2000) (the "distinction between laws burdening and laws banning speech is but a matter of degree").[4]

Respondent's proposed interpretation depends entirely on the illusory proposition that "requirements and regulations" and "prohibitions" can be divided into two distinct compartments. Petitioner's interpretation, by contrast, recognizes that in reality there is a substantial degree of overlap between the two terms. Under this interpretation the term "or which prohibits" serves the logical function of providing explicitly that the pre-existing

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[4] Under Respondent's proposed approach, Section 51-28-02 itself may not constitute a "prohibition" because it permits pre-recorded calls under certain circumstances. This underlines that Respondent's interpretation is both incoherent and unworkable, because it provides no basis for determining when a State would or would not have authority.

State power over intrastate calls, which was preserved by the saving clause, may extend to include an absolute "prohibition" of prerecorded intrastate calls.[5]

Second, the State's construction ignores the interpretation of the TCPA by the FCC, which determined that interstate political calls should not be prohibited.

5. Other than the decision of the Utah Supreme Court in *Flagship Capital*, none of the cases on which Respondent relies holds that the TCPA saving clause grants the States authority to regulate interstate calls. (Opp. at 12-16). These cases generally address the question whether Congress intended to give State courts or federal courts subject matter jurisdiction over the consumer damages action created by the TCPA.[6] To the extent these opinions note the saving clause in passing, those discussions are dicta.

Respondent also relies upon *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995), but its own argument demonstrates that the case addressed State regulation of intrastate, not interstate, calls. The Opposition notes that

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[5] This answers Respondent's claim that the phrase "or which prohibits" must be interpreted as applying to interstate calls in order to prevent it from becoming surplusage. (Opp. at 7).

Respondent also argues that Section 51-28-02 is not preempted because it is possible for a person to comply with both the federal and State laws simultaneously, by not engaging in the activity that is permitted by the FCC rule. (Opp. at 7-8). The statute is nonetheless unconstitutional because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier*, 529 U.S. at 873.

[6] *Erienet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513 (3rd Cir. 1998); *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287 (11th Cir. 1998); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507 (5th Cir. 1997); *Int'l Science & Technology Institute v. Inacom Comm., Inc.*, 106 F.3d 1146 (4th Cir. 1997). The remaining case, *Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*, 184 S.W.2d 707 (Tex. 2006), considered the date on which Texas had granted its consent to such a cause of action.

the lower court in *Van Bergen* found that there was no evidence that the Minnesota plaintiff intended to make prerecorded calls anywhere other than in Minnesota and thus concluded that he lacked standing to address issues that other parties might raise. (Opp. at 13 n.7). In any event, the Supreme Court of North Dakota did not rely on *Van Bergen* to support its conflict preemption analysis.

6. In addition to adopting substantive federal rules to regulate interstate telemarketing calls, the TCPA carved out a significant role for the States. Besides preserving the States' ability to adopt laws which impose "requirements or regulations on" or "which prohibits" intrastate calls, the law authorized the States to participate in its enforcement. In particular, the States may seek injunctive relief in federal court for violations of the TCPA, 47 U.S.C. § 227 (f)(1), and have discretion to determine whether their courts will exercise jurisdiction over the private damages action that Congress authorized. 47 U.S.C. § 227 (b)(3).

Congress did not, however, grant the States concurrent jurisdiction with the FCC to *define* what types of prerecorded, interstate political calls should be lawful.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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